I have four observations to make on this case. In [159] the first place it has evoked considerable [159] adverse criticism amongst the very able gentlemen who deal with the subject of motor vehicle accidents in current legal literature in England. In the second place I am not bound by any decision of the English Appeal Court although, of course, every such decision is entitled to my profound respect. In the third place I have come to the conclusion that it should be confined strictly to its own special facts until the position is further elucidated by decisions of the same or a superior Court. And in the fourth place it seems to me that *Parker* v. *Miller, supra,* by which I am not bound, is at variance with the Privy Council case of *Samson* v. *Aitchison,* by which I am bound. In the latter case the judgment of their Lordships was delivered by Lord Atkinson, who stated :—

"The learned Judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: 'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne,* [1907] 1 K.B. 40. The duty to control postulates the existence of the right to control. No doubt if the actual possession of the equipage has been given by the owner to a third person — that is to say, if there has been a bailment by the owner to a third person — the owner has given up his right of control."

Surely it is clear from Williams J.'s statement of the law, which was accorded the high testimonial of "perfect accuracy," that their Lordships of the Privy Council considered that where the owner of a motor vehicle has handed over both actual possession and right of control to another, that other and not the owner would be liable if an accident occurred through the other's negligent driving. At any rate that is my present view of their Lordships' judgment in *Samson* v. *Aitchison, supra,* and the fact that the English Court of Appeal in *Parker* v. *Miller, supra,* is said to have "proceeded on" *Samson* v. *Aitchison, supra,* cannot alter the clear and "perfectly accurate" statement of law I have just quoted. In rejecting Mr. Benjamin's argument on *Parker* v. *Miller, supra,* I am simply following that statement.

Lastly, we come to ground 4, and on this ground the argument revolved around the case of *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow,* [1937] App. Cas. 67, which I cited to counsel and in which Lord Tomlin stated :—

"The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. Here, however, there was more. The trial Judge had taken an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence. Thus the respondent was placed at a disadvantage as the direct result of the trial Judge's error."

From this case I gather that if a Judge (or Magistrate) misdirects himself as to the onus of proof and places it on *A.* when it should have been on *B.*, then, if he gives judgment in favour of *B.*, *A.* is entitled to a new trial unless the Appeal Court can be perfectly sure that the trial Judge (or Magistrate) must have come to the same conclusion of fact even had he directed himself aright as to the burden of proof. I confess that I have experienced some little doubt and hesitation before arriving at the conclusion that there is a real and substantial difference between this case and the one now before me on appeal. In the latter case the learned Magistrate has not really misdirected himself as to the burden of proof, it undoubtedly rested on the plaintiff. All that he can be said to have done is to have failed to appreciate that proof of ownership of a motor vehicle is some evidence to show that the person driving it is the servant or agent of the owner. On a careful consideration of the whole proceedings, including the learned Magistrate's judgment, it seems to me quite impossible to say that his failure in that respect "coloured his whole outlook as to the facts and substantially prejudiced the plaintiff's chances." On the issue as to whether Chin Hon was the defendant's servant or agent the learned Magistrate carefully weighed the evidence for and against, and came to a clear [160] and definite conclusion that Chin Hon [160] was not such a servant or agent. I can see no reason whatever to doubt that he would have arrived at the same conclusion even if he had appreciated the presumption which arose from the mere proof of ownership of the motor vehicle.

For these reasons, which I have set out at considerable length, I must dismiss this appeal. However, since I am of opinion the defendant's failure to raise the issue of agency clearly and definitely in his pleading has considerably increased the length and costliness of these proceedings, he will be allowed only half his costs in this Court.

Appeal dismissed.

JOHORE REPORTS

RAMAN CHETTIAR v. TEO GEE & ANOR. VINAITHEETHAN CHETTIAR v. TAN KIAN

[O.C.J. (Thorne J.) April 20, 1934]

[Muar Originating Summons No. 3 of 1934]

Land — Attachment of — Caveat — Unregistered agreement for lease — Johore Land Enactment, s.50.

Lands held under Entry in the Mukim Register were attached in execution of a judgment obtained by a chetty against the registered proprietor thereof, subject to caveats being entered by persons who claimed to be lessees of the lands by virtue of agreements for leases dated prior to the chetty's judgment. The agreements were not registered. In an application by the chetty that the caveators be called upon to shew cause why the caveats should not be withdrawn:—

Held: that the attaching creditor was entitled to call in question the registration of the caveats.

An attaching creditor is, on the registration of a prohibitory order against land, a person claiming land within section 50(iv) of the Johore Land Enactment.

Held further: that the caveators had no interest in the lands at the time of the presentation of their caveats, inasmuch as they had no leases nor did they hold any document registrable as a lease.

A lease for a term exceeding three years is not effective so as to vest any interest in land in any lessee, unless it has been registered under the Enactment.

ORIGINATING SUMMONSES heard together.

Williamson for the plaintiffs.

Lahiri for the defendants.

Cur. Adv. Vult.

Thorne J.: These two originating summonses were heard together.

In each case a chetty recovered a money judgment against the registered proprietor of lands comprised in and held by Entry in the Mukim Register. In each case the debtor had deposited with the chetty one or more of his extracts.

In execution of his judgment the chetty applied for attachment and sale of the lands comprised in these extracts and the attachment was allowed subject to caveats entered by the defendants.

The defendants the caveators claimed to be lessees of the lands attached under agreements for leases written in Malay characters and dated in each instance prior to the chetty's judgment.

The chetty applies in each case that the defendants be called upon to shew cause why their caveats should not be removed. Two of the agreements were put in evidence, and proved to be agreements for the lease of lands for terms exceeding three years in consideration of the payment by the proposed lessee of a premium, so that in the instances in which the judgment debtors had deposited the E.M.R.'s with the chetty creditors as security for loans they have raised moneys for these defendants by the taking of a premium at a time when the extracts were already deposited with the chetty creditors as security thus attempting to defeat *pro tanto* the creditors' security.

For the defendants it was argued that the attaching creditors had no *locus standi* to bring these matters before the Court, or to attack the registration of the caveats, and that the caveators as the holders of agreements for leases for terms of years were persons having a sufficient interest in the demised lands to entitle them to register caveats.

For the attaching creditors it was argued that they are in the result assignees in law of the whole of the interest of the judgment debtors in the lands attached; that the caveators had no interest in the lands or other rights which entitled them to register the caveats; and that the Collector of Land Revenue should have refused these caveats when they were presented for registration. Section 50 of the Land Enactment reads as follows:—

"Any person claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission, or under any unregistered instrument, or otherwise howsoever, in any land under this Part held by entry in the Mukim Register may lodge a caveat with the Collector to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as to such caveat may be expressed, or until notice shall have been served on the caveator, or unless the instrument of disposition be expressed to be subject to the claim of [161] the caveator, as may be required in such caveat, or to any conditions conformable to the law expressed therein."

Subsection (iv) of that section reads as follows:—

"The owner or other person claiming land may, by summons, call upon the caveator to attend before the Court to shew cause why the said caveat should not be withdrawn; and it shall be lawful for such Court, upon proof that such last-mentioned person has been summoned, and upon such evidence as such Court may require, to make such order in the premises, either *ex parte* or otherwise, as to such Court shall seem fit. And where a question of right or title shall require to be determined, the proceedings shall be, as nearly as may be, in conformity with the rules of Court in relation to civil causes."

The question first to be considered is whether the attaching creditors are entitled to call in question the registration of these caveats. The only person who can apply under the provisions of subsection (iv) of section 50 of the Land Enactment are either the "owner" or "other person claiming land." Mr. Williamson urges that the effect of the presentation and registration of a prohibitory order under the provisions of section 23A of the Land Enactment is to vest in the attaching creditor the whole of the interest of the registered proprietor, or in other words to effect a complete transfer by operation of law of the rights of the registered proprietor to the attaching creditor. I am not prepared to go quite the full length of accepting this proposition. The effect of a prohibitory order is to prohibit the judgment debtor dealing with the land, and, so far as the attaching creditor is concerned, confers rights upon him which enable him to proceed to a sale and ultimate transfer of the land to a purchaser under the provisions of the remaining subsections of section 23A, and I am of the opinion that the effect of this in law is that the attaching creditor is upon registration of a prohibitory order against land a person claiming land within the meaning of subsection (iv) of section 50. It is unnecessary therefore for me to go on to consider whether or not the attaching creditor is an "owner" within the meaning of that subsection.

The next question is whether the caveators are persons who were entitled to present and register caveats under the provisions of section 50.

I entertain some considerable doubt as to whether a proprietor of land held by Entry in the Mukim Register can grant an effective lease of his land.

Whether or not, a lease for a term of more than three years cannot be effective to vest any interest in land in the lessee unless and until it has been registerd under the Enactment. The caveators had no leases nor do they hold any document which is capable of registration as a lease, and they therefore have no interest in the land at the time of the presentation of their respective caveats.

In my view therefore these caveats should never have been registered by the Collectors of Land Revenue, and I order that the caveat be removed, the memorial of registration in each instance be expunged from the register, and the register rectified accordingly.

The plaintiffs in each of these cases will be entitled to recover their costs of these proceedings against the defendants to be taxed.

Orders accordingly.

Solicitors: *S. C. Goho & Co.; J. M. Lahiri.*